UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

MAURINE NIEMAN, ET AL, Plaintiffs, vs. DUKE ENERGY CORPORATION, ET AL, Defendants.	No. 3:12-cv-456

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MAX O. COGBURN, JR.
UNITED STATES DISTRICT COURT JUDGE
AUGUST 12, 2015

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P R O C E E D I N G S

WEDNESDAY MORNING, AUGUST 12, 2015

(Court called to order at 9:23 a.m.)

THE COURT: Thank you and good morning.

ALL COUNSEL: Good morning.

THE COURT: Okay. I understand we have a settlement.

For the record, we'll call the case of Nieman versus Duke Energy Corporation, 3:12-cv-00456.

Are the plaintiffs ready?

MR. GRONBORG: Yes, Your Honor.

THE COURT: Is the defense ready?

MS. HARDEN: Yes, Your Honor.

THE COURT: All right. I guess what we need to do to start off this settlement hearing is for an announcement of the essential terms of the settlement. So who's going to be announcing that for us?

MR. GRONBORG: I will, Your Honor.

THE COURT: All right. Very good.

MR. GRONBORG: The primary terms of the settlement is an all cash resolution of the case for $146,250,000. As part of the settlement and fully set forth in the Stipulation of Settlement with it, there will be a full release.

The issues that we're here today on are, of course, the final approval of that settlement, the approval of the plan of allocation which is for the distribution of those settlement funds, the reimbursement of expenses for counsel and for the lead plaintiff Amalgamated Bank, and then last for attorneys' fees.

I should note for the record, counsel are here for Fiduciary Counselors and the Duke plan for one of the two objections that were filed to the settlement.

THE COURT: Okay, yeah. We've looked at all of that. So what is the proposed attorneys' fees in the case?

MR. GRONBORG: Proposed attorneys' fees -- the proposed attorneys' fees in the case, Your Honor, are 24.5 percent. That was what was set forth in the notice that has been sent out to over 450,000 class members.

Happy to go through -- I know this has been laid out in the papers -- the basis for the proposed fees.

I think the key starting point for fees in the case is how they're determined. As the court is well aware, there are generally two different methods of determining fees in a contingency case. There's the lodestar methodology, which is billable hours times billable rate, and there's the percentage of the recovery methodology.

The first, the lodestar method, is typically used where you have statutory fee provisions or fee shifting cases. I think in those there's a real focus on what the billable hours are, what the billable rates are.

In cases brought under the Private Securities Litigation Reform Act, in particular, like this one, and common fund cases, the statute itself says that fees are to be determined as a percentage of the recovery. And I think what you'll find in most of the cases, and the objectors agree, is that in common fund cases such as this, the percentage of the recovery methodology is generally considered superior to the lodestar.

Now, the Fourth Circuit has not mandated that any particular system be set up for the adjudication of fees, but courts throughout the Fourth Circuit have generally accepted that the percentage of the recovery method is preferable.

And if I could, I think -- I think before getting to the specific fees, it's worth talking about why these cases have found that percentage of the recovery method is so preferable in a case like this.

First, it encourages efficiency and the expeditious resolution of cases without sacrificing any of counsel's desire to get the best possible outcome for plaintiffs in the class.

Second, it eliminates a lot of the sort of nitpicking and questions that often we see regarding what was worked on, what billable rates are, what should be included, that you get in a lodestar analysis. There's a strong effort that a lot of circuits have recognized to try and move away from that.

Third, and importantly, it eliminates any incentive to churn bills, to run a case out longer. Of course, if you have a percentage of recovery, most importantly, it aligns the interests of counsel and plaintiffs in the class that they represent.

I believe that the *Wells Fargo* case that was cited in our reply brief out of the Southern District of West Virginia where it recently said not only is the percentage of recovery method preferred, but it's the best method because the counsel are rewarded for a good result and penalized for a bad result.

Here, what we've done in the papers is gone through factors that were emphasized in the *Johnson v. Georgia Highway* case which is out of the Fifth Circuit and which the Fourth Circuit has adopted. I don't want to belabor the issue here this morning --

THE COURT: No, but we can -- and we can talk more about that in a minute.

MR. GRONBORG: Sure.

THE COURT: Let's go through the notice first that was provided.

MR. GRONBORG: Absolutely.

THE COURT: Then we can get back down to the attorneys' fees a little bit, and I have some ideas on my own about that --

MR. GRONBORG: Okay.

THE COURT: -- concerning what the multiplier ought to be in a situation like that, particularly when the -- when the settlement amount is over a hundred million dollars and where generally those things drop more than where most of them are. There's a lot of things to talk about before I decide what the attorneys' fees ought to be.

But tell me about the notice. I know we left out West Virginia, but tell me about how you did the nature and form of the notice.

MR. GRONBORG: There are two issues. I think West Virginia really deals with the Class Action Fairness notice, the CAFA notice, what we had for the settlement itself. As you know, at the preliminary approval hearing we approved the form of the notice. After that form of notice was approved, it was sent out to more than 450,000 potential class members.

And so what we're able to do there is -- the company itself, Duke, has records of people who purchased during certain blocks of time. They don't have the actual specific records of who bought on a particular day, but we were able to take those records. We worked with --

THE COURT: How many of those -- how many of those were returned?

MR. GRONBORG: Were returned?

THE COURT: Yeah.

MR. GRONBORG: To date we have had 60,000 claims notices that have been processed. That is still ongoing. So there have been 60,000 notices. Of -- the claims administrator has processed under 20 percent of those. What they have processed so far represents approximately 40 million shares of Duke stock. And so extrapolated out, if that continues at that pace, it means that claims would have been made on approximately 200 million shares of stock from the class period. And our own estimates were that there were 290 million damage shares.

So based on what we have to date, we have a two-thirds return rate on the shares themselves, the damage shares. And I think that's -- it's obviously very high for any class action. A lot of that is driven these days by the fact that so much stock is held in street name or by mutual funds, and the electronic record keeping that goes along with it these days really makes the claims process in a securities case like this easier. You know, your Wells Fargo, your Bank of America, you know, can quickly respond with a large amount of information identifying class members.

So that has been -- obviously, in addition to that there was the newspaper publication. Maybe more important, today there's a dedicated website that was set up that has the claims form on it.

THE COURT: When was that set up?

MR. GRONBORG: The dedicated website was initially set up at preliminary -- prior to the preliminary approval or at preliminary approval. And then as the papers -- you know, as things were approved it got added.

THE COURT: For the record, do you remember the date?

MR. GRONBORG: The date it was set up? I don't have the specific date.

THE COURT: We can look -- we can locate that.

MR. GRONBORG: It would have been within a day or two of the preliminary approval order being signed, Your Honor. So it would have been set up prior to mailing, prior to publication.

And then with that, of course, the claims administrator sets up a dedicated 800 number for people to call plaintiffs' counsel. Our firms as well have dedicated numbers of staff to assist people in filling out claims.

The second issue I think you raised is with regard to the Class Action Fairness, the CAFA notice. And there was a submission -- Ms. Harden made the submission. Do you want to address that?

MS. HARDEN: Yes, Your Honor.

On July 29th we filed a declaration which set forth and explained that we had initially missed West Virginia for the attorney general. We had served it on the West Virginia Public Utility Commission. And that would have been sufficient if Duke Energy had distributed electricity in West Virginia. Since it does not, we gave notice by Federal Express. And under the applicable statute, that 90 days will have run by October 23rd of 2015.

THE COURT: Okay. Thank you.

MR. GRONBORG: Now, to the best of our knowledge, I believe defendants as well, no state has ever stepped in through a securities complaint or otherwise said that it doesn't apply to CAFA. There's a problem with the settlement. But I do understand the abundance of caution approach that defendants have suggested in terms of holding in abeyance the order and we don't have an objection to that.

THE COURT: All right. What about -- how many opt-outs or request for exclusions were there?

MR. GRONBORG: To date there have been 170 timely opt-outs. There are an additional seven people who requested to opt out or be excluded from the settlement. As of the time of this hearing, I think on average they have about a hundred -- somewhere between a hundred and a thousand shares per person. No institutions have opted out. No real large individual investors have opted out of the case. There hasn't been anybody who, to the best of our knowledge, has filed a case or opted out for the sake of bringing a new case.

So from -- it is from our perspective fairly typical. There's a certain number of people who simply don't want to participate in the class.

THE COURT: Would it be about 14,000 shares would be about what --

MR. GRONBORG: I think it's actually a little higher than that. I think if you add in some of the new ones, it's in the 14 to 16 thousand share range. Our math was it's a thousandth of a percent of the damage shares.

THE COURT: Okay. Any number of objections other than that?

MR. GRONBORG: Two objections, Your Honor.

There was one objection made by a Donald Pierson of Ft. Worth, Texas, who is not here today. He did not give us any notice that he was going to appear. He sent a letter. We received a letter by facsimile so it was not -- to the best of our knowledge, it wasn't submitted to the court. It didn't appear on the docket, but we did include it as an exhibit on the reply brief.

The second objection was made by Fiduciary Counselors on behalf of the Duke plan. As noted, they are here today. Obviously can have an opportunity to speak.

Very quickly, I understand we'll talk fees. Fiduciary Counselors, according to their papers, have no objection to the settlement itself, the plan of allocation, the reimbursement. It's strictly on the fees.

THE COURT: The fee issue, right.

MR. GRONBORG: Mr. Pierson has an objection, it sounds like, to the information that was provided in the settlement. He doesn't object to the settlement -- he's made a claim -- the plan of allocation, the reimbursement. He does say he objects to the notion that the settlement doesn't identify specifically which entities are contributing which amount to the settlement fund. As we noted in our papers, however, that's not something that's required by Rule 23. It's an objection that Mr. Pierson has made before and has been rejected. As far as we know, every court has rejected that objection. Frankly, defendants have made all of the disclosures they need to regarding the settlement fund and the class has the critical information, of course, which is what is the total amount of the fund as opposed to which entity contributed which amounts.

So that is -- whether that's considered an objection to the notice or the settlement, it's a little -- it's a little hard to tell, but that is the only objection, frankly, to the settlement itself. There have been none as to the plan of allocation, none as to the reimbursement. Again, just the two as to fees.

THE COURT: What about opportunity to be heard for class members?

MR. GRONBORG: The notice identified that the hearing would be today. That was also included on the website. It's a fairly prominent notice. Nobody told us that they had a desire to be heard. We did not hear from anybody that they wanted to be heard and couldn't. Obviously, we've got -- Fiduciary Counselors are here and are able to --

THE COURT: Are there any class members here?

(No response.)

THE COURT: All right. Apparently no, hearing no one. That's the way it looked to me, but I thought I better put it on the record.

MR. GRONBORG: I think that's probably appropriate.

THE COURT: Very good. All right.

MR. GRONBORG: And we did double check the address in the notice and came to the right place.

THE COURT: Let me hear from defense. What's the defendant say about the settlement?

MS. HARDEN: Defendant has nothing substantive to add, Your Honor. We believe that plaintiffs have accurately described the material terms and that all the necessary steps have now been taken for this settlement to be reviewed by the court.

THE COURT: Okay. I've read a lot of stuff here. As more fully set forth in the written order which I will sign in October unless objection is interposed by the State of West

Virginia, the court finds as follows and will find as follows:

The court finally approves the settlement agreement and the terms set forth therein.

The court reaffirms its prior certification of the settlement class for settlement purposes for the reasons previously set forth in this order granting preliminary approval of the settlement.

The court finds that the notice of the settlement was given to the settlement class members by the best means practicable under the circumstances.

The court also finds that the parties have complied with their notice obligations under the Class Action Fairness Act, 28, United States Code, Section 1715.

The court notes that the officials in the State of West Virginia were initially overlooked, but that counsel, once the mistake was realized, have, in fact, effectuated service, and the court will hold open this matter to allow the State of West Virginia and/or others to interpose any objection or comment, if any, to this settlement.

The formal method of notifying the settlement class fully, fairly, accurately, and adequately advised settlement class members of all relevant material information concerning the action in terms of the proposed settlement and fully satisfied the requirements of due process and Rule 23.

No objections to the settlement have been filed in response to the class notice.

The court notes a number of shareholders have opted out; however, such opt-out represents approximately 14,000 to 16,000 shares which is minimal in light of the defendant's capitalization. The court recognizes that an exact figure is not available right at this moment, but that should approximate -- does anyone disagree with that number today?

MS. HARDEN: No, Your Honor.

MR. GRONBORG: No, Your Honor.

THE COURT: Okay. The court finds that the settlement was negotiated at arm's length in good faith by highly capable and experienced counsel with full knowledge of the facts, law, and risks inherent in litigating the action.

The court finds the settlement is fair, reasonable, and adequate.

Each settlement class member shall be bound by the settlement and the releases set forth in the settlement agreement.

Those persons who have timely requested exclusion from the settlement class are not members of the settlement class and shall have no rights or interest with respect to the settlement, shall not be bound by the release, and shall not be bound by any orders or judgments entered with respect to the settlement.

The court hereby dismisses on the merits and with prejudice all claims asserted in the above-captioned action against the defendants as part of this settlement.

Once again, the settlement will not be finalized until we hear from West Virginia in October. But this is a -- this will be the -- this will be the order assuming we get no objections from West Virginia that we have to hear.

The settlement agreement shall be the exclusive remedy for any and all release orders.

The court hereby retains jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation, and enforcement of this settlement.

Is there anything else that either party can think of needs -- that's going to need to be included in this order other than the attorney's fee issue which we'll hear in a minute?

MR. GRONBORG: Two other issues.

One, I think, is the finding of the plan of allocation that was included in the notice is fair, reasonable, and adequate, which is typically a separate issue. It's governed by the same rules --

THE COURT: Not just that the settlement is fair, reasonable, and adequate, but that the plan of allocation is?

MR. GRONBORG: Correct.

THE COURT: Okay. We'll take note of that and we'll include that in there. Anything else?

MR. GRONBORG: Other than the fees, the other issue, then, would be the reimbursement of expenses.

THE COURT: Right. Which is going -- which is going to be part of what I'm going to talk about when we do the fees and expenses.

MR. GRONBORG: Then no, Your Honor.

THE COURT: Okay. Very good.

MS. HARDEN: No, Your Honor. That's it.

THE COURT: All right.

All right. Let's hear about the attorneys' fees. The requested award appears to be 24.5 percent of the settlement fund of the $146.25 million settlement fund which would amount to, if awarded, $35,831,250 in attorneys' fees. And the request is for expenses in the amount of $191,738.27, plus interest at the same rate earned by the settlement fund, and $20,612.50 to lead plaintiff Amalgamated Bank for the time it spent representing the settlement class.

The objection that's been filed argues that the requested percentage fee award is unreasonably high when cross-checked against the lodestar multiplier. That the lead counsel should not receive a windfall because the circumstances of the case allowed for a relatively low lodestar. That Fiduciary Counselors recommend lead counsel's fee request be reduced so that the fee award can pass the lodestar cross-check, and that lead counsel -- noted lead counsel expended approximately 6,900 hours of attorney and paraprofessional time resulting in a lodestar of $4,091,730.25, approximately, at a $600 hourly rate. The requested fee is 8.75 times lodestar. And the objectors are asking the court to use a multiplier of 4.5 which it contends is on the high end of reasonable in the Fourth Circuit.

I will notice that there are a number of cases, I think, out there that talk about lodestar ranges from 1.3 to 4.5.

So I'll hear from -- first let's hear from plaintiff with -- first I think we ought to hear from the objectors first. Let's hear from the folks that are objecting to it. Let's hear what you want to say about this.

MR. FULTON: Thank you, Your Honor.

Good morning, Ross Fulton from Rayburn, Cooper & Durham. With me is Thomas O'Connor from the Virginia bar who has been admitted pro hac vice in this matter. We're here on behalf of Fiduciary Counselors which is representing the Duke Energy Retirement Savings Plan. Mr. O'Connor is going to handle our argument if that suits the court.

THE COURT: That will be fine, whatever you gentleman want to do. And I'll hear from all and everybody. If everybody wants to speak on this, that's okay.

MR. FULTON: Thank you, Your Honor.

MR. O'CONNOR: Your Honor, thank you.

Again, my name is Thomas O'Connor. I'm with Fiduciary Counselors. We are the independent fiduciary for the Duke Energy Retirement Savings Plan which is a class member in this settlement.

We were retained by the fiduciaries of the plan specifically because we are independent from Duke Energy. One of the requirements under the Department of Labor's PTE 2003-39 is a fiduciary who's independent from all the parties makes certain determinations. Among our responsibilities were evaluating this settlement under PTE 2003-39 and deciding whether on behalf of the plan to opt out and/or object to any part of the settlement.

As we're standing before you today, we did file an objection to the fees. We're really not here to debate whether or not the percentage method versus the lodestar is -- or if one is more appropriate than the other. We do feel, however, that the lodestar multiplier cross-check is certainly a tool that the court can use to assess the overall reasonableness of the fee request.

Plaintiffs' counsel actually mentioned a statute which says that it prefers the percentage. It's actually a reasonable percentage. We simply don't think that a multiplier of 8.75 is reasonable.

And there's case law both within this circuit and in other circuits throughout the country where the court has looked at the lodestar and has brought the fees down both as a percentage and so that the lodestar multiplier is more appropriate. As you pointed out, the range is 1.4 to 4.5.

There's a case in the Sixth Circuit that actually went up all the way to 6. Again, the court looked at it and said they were comfortable. It was *In Re: Cardinal Health* in case the court is interested. They weren't uncomfortable going outside of the range that had previously been established.

Plaintiffs' counsel rightfully points out that this is a great settlement. We don't take issue with the settlement. They achieved success for all class members, and that should be taken into account. But at the same time, the lodestar formula and a lodestar multiplier of 8.76, we just don't think it's in line with what's been awarded in previous cases.

THE COURT: All right. Thank you.

MR. GRONBORG: Thank you. We appreciate -- we worked with Fiduciary Counselors in this case. We appreciate that they are and the Duke plan is participating in the settlement and we do appreciate their recognition that it's a great settlement.

That's really where I'd like to start. I appreciate your remarks talking about lodestar and multipliers. And the very basis behind the percentage of the recovery methodology really is to align the interests of counsel with the class. And what has happened under -- in those districts where lodestar, you know, is critically important and where they use the multiplier to cap fees, as you see, cases don't settle early. Bills get churned. Cases run on for years and years because, frankly, the lawyers end up being more incentivized.

And I think what no -- what no objector has said here is that this is not an excellent result.

THE COURT: No, I think it's -- I think it appears to me -- to the court to be an excellent result. The only question on it is to make sure that it's a fair fee. Now, I know that there's a battle between -- you know, you say, okay, you've got to multiply times the number of hours, and you don't want -- you don't want all these hours being thrown into the mix.

I'm reminded of the joke about the lawyer that died and went up to the pearly gates and said, What did I die from? I'm surprised I'm here. And St. Peter said, Old age. And he said, But I'm only 45. He said, Your time sheets say you're a hundred and 20.

So you don't want to get to the point where lawyers are not just churning, not just doing work and making more hours, but billing hours to try to get the lodestar up that may show that they're working 15, 16 hours a day. And I know from having filled out time sheets, it takes a lot of hours just to get an 8-hour day billed. If you're really honestly putting the stuff down, it's very, very hard. You're not going to work 8 hours and be able to do that. You're talking to colleagues about junk. You're going out to lunch. You're taking breaks to go to the restroom. You're doing all sorts of things. So it takes about 11 hours to get 8 hours in.

MR. GRONBORG: It does. I agree with that completely, Your Honor.

I was going to say the only caveat I'd put to it is sometimes it makes you feel like you're a hundred and 20 years old when you're filling out the time sheets.

THE COURT: There is no question about it. The worst thing I've ever done in my life is fill out time sheets. It's an awful thing.

MR. GRONBORG: I'd be the most interested person in saying it should be completely by lodestar and we shouldn't have to do time sheets at all. But we do do them with our clients. We operate under an assumption that percentage of recovery really is the best methodology.

THE COURT: But doesn't it go down as the result gets better? In other words, it's not just -- I mean, I know in the typical plaintiffs case, if you take it on a third contingency and you get $3 million, you get a million. And if you get $30 million, you get 10 million.

MR. GRONBORG: Right.

THE COURT: But in these kinds of cases, is it not the normal that when these things begin to go up above over a hundred million, the percentages come down?

MR. GRONBORG: I think what you see is there is a gradual decline. There's no magic at a hundred, 500 million.

THE COURT: I understand. A lot of it has to do with how good the result is. But when there's a whole lot of money being made there, there's a whole lot of attorneys' fees being paid out. And we want to keep these good lawyers over here on the plaintiffs side working and doing their good work. We don't want them to retire.

MR. GRONBORG: Well, I can give you my written assurance that I'm not going to retire regardless of what the fee is. I'm pretty sure that applies to everyone here.

But on the percentages -- and it's a good place. There was a NERA study that was cited by Fiduciary Counselors and it was cited in our reply brief and attached to it. And I believe Fiduciary Counselors used that as a way of saying 18 percent was an appropriate fee because that is the average fee in cases that settle between 100 million and 500 million.

Now, what the report shows is that over the period 1996 to 2014, the average for cases that settle between 100 million and 500 million is 22 percent. That's -- and that, of course, is regardless of objections, recovery, anything else. So half are above 22 percent, half are below.

In cases that settle up to 100 million, the average recovery is 26.8 percent.

And so frankly, the fee here is sort of slotted right in between those two averages. And that is -- despite the fact that the recovery here is so substantial. And what I -- at the end of the day, what the class sees is you recover $146.25 million.

What we've tried to emphasize in the paper, and what I believe is, you know, why this settlement has been described as "off the charts" in the news is the percentage of the damages that were recovered. That same study that talks about average fees of 22 percent to 26.8 percent also talks about how cases on average settle for about 2 percent of damages. Cases in that 500 million to 990 million damage number settle for in the 2 percent range.

Here, based on the notice, and we told people this, we're recovering 26 percent of the damages. And that is extraordinary. Some of the cases in front of the court where the courts have talked about that, they've said a 6 to 10 percent recovery was outstanding and justified a fee.

But the reason why I point to those percentages -- and they're all numbers. I mean, I think at the end of the day there's no doubt any one of us can go out and find a case. You know, we can find cases that have high lodestar, low lodestar; higher percentages, lower percentages because, of course, courts take into account the specific factors in a case.

THE COURT: Where do you have one doing 8.75? What case do you have where they awarded 8.75?

MR. GRONBORG: Well, I'll tell you this. There are --

THE COURT: Or would I be -- would I be the example of the over-the-top award -- lodestar award?

I guess the reason the award is 8.75, though, is you've really not had to put as many hours in this case as happens in a lot of cases. Would that be true?

MR. GRONBORG: Oh, absolutely. There is absolutely no question that this case settled faster. I was in a different court recently having this discussion. In that case we had a negative lodestar. You know, it did not settle until after all the discovery was completed and summary judgment. And frankly, the court there was a little surprised, you know, with the fee and said why aren't you trying to get your lodestar? And we said because, you know, we live and die with what the result is.

Here, undoubtedly our lodestar would be higher if we had spent three more years, we litigated this case. But the real question, of course, is would the result be better? If we were in front of you three years from now after, you know, more motion practice, class certification, summary judgment, depositions, we would still be getting the class $146.25 million and the class would be worse off. They would be three years down the road. Whatever the money is worth today, it would be worth less in the future. They would have undergone all those risks.

As I said, there is nobody who has come forward and said you left money on the table. I think it would have been foolish for us to have done that. And of course, we're going to look out for the best interests of the class.

And it's on that. I mean, one critical factor here and it's why this NERA report matters is that the lead plaintiff, and particularly the lead plaintiff Amalgamated Bank, is a large institutional investor. They have an in-house legal department. They have a long and distinguished history of being involved in cases like this and representing investors. The fee we made is based on the fee that they recommended we make. We don't make a fee without consulting. And they independently researched the fee. They independently looked at what the results were in the case, and they told us to go and make a request for 24.5 percent.

Now, they fully understand that it's in your discretion, that it's at the court's discretion. But they don't just -- they don't make the same fee requests in every case. They independently evaluate those factors. They go and make a decision.

And I bring it up because one of the factors they look at is the NERA report. They told us we look at the NERA report. We look at what averages are. But the driving force behind their fee decision, you know, typically is the percentage of recovery. And they do look at our hours. They do look at what the lodestar is.

But again, they thought that was a fair and reasonable fee, as did the other -- the two other lead plaintiffs and they all supported that fee.

THE COURT: But there's not -- there's not a case where it's 8.75. I know we've got one where it was 6 and we've got the normal range is about 3, 1.3 or 1.4 to 4.5.

MR. GRONBORG: Well, Your Honor --

THE COURT: I'm trying -- and I'm not necessarily saying I have to hit any of those numbers, but there does seem to be a large difference between, let's say, 4.5 and 8.75.

MR. GRONBORG: Your Honor, what I would say is you have a group of cases that discuss lodestar. When cases are discussing lodestar, they tend to focus on the multiplier. The majority of cases, you know, a large number of cases, and I think we've cited a lot with regard to percentages, they don't talk about it. So there is no calculation. So there is sort of a self-effectuating cap on it when you've already reached the point where you said, well, lodestar is going to be a driving force behind it.

So we submitted the *Mills* case here, *In Re: Mills*, which is out of Virginia. And one of the things I thought was very interesting in that case is near the end of it the court has a chart, a page, two-page chart there of different cases' settlements. And what it has is the total settlement amount and the percentages. And the court was looking at percentages particularly in large cases. And unfortunately, there is no discussion about the percentage of recovery. If there was, I'm sure we would be pointing to it and saying, you know, look how great this is. There's not a discussion about lodestar.

But what you see is there are -- you know, if the numbers are right here, there are seven cases with settlement figures between 75 million and 250 million dollars. Of those, one case has a fee of 18 percent, the number that's been recommended by Fiduciary Counselors. The other six cases, the fees are 25 to 30 percent. You've got three or four of them that are right at 25 percent and another cluster that are between 25 and 30 percent. So these are cases ranging up to $200 million in settlements.

And again, most of those don't go -- don't talk about lodestar, you know, because they're focused on this is what the recovery is.

Happy to go through and try and do the math and find the ones where it's more than 8 or not, but they simply don't.

I think what it stands for -- in the first instance what it stands for is -- of course, as I said before, we can all find cases that say one thing or the other. It's just the nature of fees. There's no -- it would be nice if there was a formula, but there's no formula. You know, there's no fixed numbers.

But in the other instance, you know, what we have is a court that was independently gathering cases and it's clear that the court wasn't just trying to gather a whole bunch of cases with large fees. You know, it was trying to get a cross section of cases. And based on that cross section, the 24.5 percent counsel are requesting here, you know, is at the low end of that. I think that again is something that the lead plaintiff took into account. It certainly is something we took into account.

THE COURT: All right. Anything else from Fiduciary Counselors?

MR. O'CONNOR: Your Honor, thank you.

I would just like to follow up on a couple points.

Plaintiffs' counsel talks about looking at the percentage, I think, in isolation. And I just don't -- I don't think that's an appropriate way to sort of go about that either.

There's problems associated with -- for the cases that don't mention lodestar doesn't necessarily mean that it's not a factor that the court can't and should not consider. So the fact that the lodestar isn't discussed, I think, is really perhaps irrelevant.

THE COURT: Yeah, the question I have to try to figure out is how much -- when a case settles as quickly as this one did, when most of these complex cases go on longer and the result is good, what -- you know, what discount do I give for the fact that the plaintiffs' attorneys were able to achieve the big success early rather than dragging it out over a long period of time. Because the clients -- you know, the clients worry about that stuff too when they're -- when they're doing it. I think sometimes clients would just rather have the result quickly than something that drags on and on for years. They would rather have a quick result. But the quick result is going to mean less attorneys hours are out there. And unless the attorneys are going to be dishonest about what they're -- about what they're billing, there are going to be lower hours for that. And it does seem like sometimes a windfall.

But if you're -- if it's an all or nothing -- if everybody could pay every hour that you billed, then you wouldn't need contingency fee cases. Of course, the public gets off on these facts of these percentages and these contingencies because they worry that the lawyers are getting a windfall, but sometimes lawyers get zero. And if they're taking the risk, they should get some of the reward.

MR. O'CONNOR: Your Honor, to that point I would just say that when you do look at the multiplier analysis, when you're saying that you're giving -- or you're awarding even 5 times what they normally would have been paid -- I'm not going to speak for plaintiffs counsel here, but if someone told me that I could come into a case and I know I'm going to get 5 times what I would normally get paid --

THE COURT: But you'd have to win.

MR. O'CONNOR: You'd have to win.

THE COURT: Yeah, you have to win to do it. I mean --

MR. O'CONNOR: Absolutely. You win some. You're going to lose some.

THE COURT: I mean, it's not like you're going up against some goofball that really doesn't know what they're doing and you're going to tear them up in court. We've got some of the highest paid, most competent attorneys we've got around here.

MR. O'CONNOR: That's right. But it should go into your calculus before you even decide to take the case what your strengths and what your weaknesses are.

Again, they were able to achieve a successful result here and quickly, but that doesn't mean -- the fact of the matter is they didn't have to spend as much time. They didn't have to work as hard. I mean, they were efficient. They did a good job and they did it quickly. But the fact of the matter is they spent less time.

THE COURT: Right, but if you really -- if you're really good and really efficient -- in other words, if you came in and hired me to be an attorney in a federal case, I would be able to put in less hours than if you took somebody right out of law school.

MR. O'CONNOR: Absolutely.

THE COURT: They would bill and bill and bill and bill and I might get the better result. Do they get more money because they had -- they weren't as good and efficient in doing it? Or do I get paid because I was -- knew exactly what I was doing, knew exactly where to go, and knew exactly what to hit?

MR. O'CONNOR: Absolutely. And that's where we think that the multiplier at some reasonable number makes sense.

THE COURT: It does seem -- this does seem a little high, the 8.75. I mean, I can't ignore the multiplier, but I'm not sure this case fits neatly into the normal multiplier situation.

MR. O'CONNOR: I think that's right.

THE COURT: The result is so good in this particular case.

MR. O'CONNOR: I think the result is good.

And I just want to point to that fact the *In Re: Cardinal Health* case in the Sixth Circuit was also, I think, a $600 million settlement. Exceptional results. The largest securities settlement at the time. The court said a 7.89 multiplier still seems high. I'm going to take it down to 6. So exceptional results, still brought it down from 24 percent to 18 percent. Multiplier 7.89 to 6.

Thank you, Your Honor.

THE COURT: All right. Thank you very much.

MR. GRONBORG: If I can just have one last word.

I appreciate your kind words about *Cardinal*. I worked on that.

THE COURT: Yeah, seems like it's kind of a friendly fight over millions of dollars.

MR. GRONBORG: Well, someone told me, and they were right, sometimes the more money you're fighting over the friendlier it can be. Nothing worse than fighting over, you know, some small amount. You end up paying the lawyers a whole lot more than what you're fighting over.

Just a few last comments.

We're in agreement here that obviously the percentage shouldn't -- we don't think it's in isolation. There are the *Johnson* factors. There are a lot of factors that go into it. And we've tried in the papers --

THE COURT: Right.

MR. GRONBORG: -- to show those.

The most important, and we do keep emphasizing it, is what the recovery is and not just the dollar amount. But what really distinguishes this case is the percentage of damages that are recovered. It is, you know, the first case I've had where it's been described as "off the charts," you know, in the press.

THE COURT: Couldn't you all have made this the biggest case? I mean, I've now heard $600 million is the biggest case. I'm not even in the same ballpark being part of this settlement.

MR. GRONBORG: Well, we're in different circumstances.

THE COURT: You could have helped me set the record.

MR. GRONBORG: I think what we should focus on is the largest in North Carolina.

THE COURT: Okay.

MR. GRONBORG: That is the important thing here to focus on is where is the largest.

We throw those around, but, of course, the problem is that number is what everyone focuses on, but it's the recovery percentage here and, you know, the recovery percentage here is higher than it was in *Cardinal*. It's higher, frankly, than almost any case. And as you -- as you noted, there's certainly no reason to punish someone for being efficient and getting it done early. There's no benefit to spending years and hours to get the same result. You know, in almost any other circumstance we'd all recognize and say, well, someone who is quick and expeditious about it should get the benefit of the doubt.

To that end, given our focus on percentage, I mean, it should be noted when we submit hours, we essentially really just stop putting in hours after the settlement. I mean, we've done settlement papers. We've spent untold hours working with our claims administrator. We have entire people who are set up to do nothing but support the claims process and to assist all the class members. None of those hours go in.

I know there's some lodestar cases and they talk about, you know, rewarding people for how much time they spent on the claims process and the settlement process. For all intents and purposes here, we've actually just -- we stopped. I mean, we achieved what we were supposed to achieve, what we think is the most important, the recovery. So at that point, you know, there's no addition of hours.

And I think that -- I think that's indicative of the way we try and bill in all these. We do not approach these as how many hours do you put in. Do you put an associate who's going to take -- you know, a first year associate who's going to take 11 hours to do a research project I can do in an hour on a project? There's simply -- you know, we are carrying these costs for as long as the case goes on.

We certainly, of course, approach these cases and look at them in terms of, you know, the likelihood. But these are very, very high risk cases. There's just no two ways about it. More than half of them are dismissed in the first instance. They're high risk no matter what you think the value is.

This case in particular, the -- you can -- the risk -- one way to look at what the risk is is you look at who else tried to bring it. Effectively there are, you know, ten or so very large firms in this country who do this type of litigation. None of them other than ours tried to get involved in this. None filed a complaint. None moved for lead plaintiff. There are, you know, about a hundred large institutions who regularly get involved in cases like this when they think, you know, there's a large recovery to be had. Other than Amalgamated Bank, none of those large institutions moved to be lead counsel here.

The North Carolina Department of Justice looked at this case. They didn't -- they looked into this matter. They didn't do any investigation about securities fraud. They didn't recover anything for investors. They probably said that's not our job. That's the job of the United States

Securities and Exchange Commission.

Well, the Securities and Exchange Commission, they had access to the same information that we did. They've never brought a case. They never recovered anything for investors.

So undoubtedly here, there was high risk and, like I said, I think the recovery is outstanding by any result and those really are the factors that we think, together with the support and decision of the lead plaintiffs, why we think it's a fair and reasonable thing.

THE COURT: Thank you. Anything further from Fiduciary Counselors?

MR. O'CONNOR: No, Your Honor. Thank you.

THE COURT: All right. With regard to the expenses, the court is going -- is there any comment -- anybody arguing about any of these expenses that are asked for?

(No response.)

THE COURT: I'm going to give the expenses as they've been requested in there. I'll do that.

With regard to the attorneys' fees, I'm going to have to think about it a little bit, and probably will do something somewhere less than what plaintiff is asking for and more than what Fiduciary is asking for, which is probably what both sides expected but just depending on where I go. It's a lot of money, but it's a good result and you folks do deserve some substantial fees for what you've done.

MR. GRONBORG: Thank you, Your Honor.

THE COURT: All right. Anything else that we need to take care of today?

MR. GRONBORG: One last thing, if I could, Your Honor.

THE COURT: Yes, sir.

MR. GRONBORG: I think I do speak on behalf of all of us, we really appreciate that the court allowed us to reach this settlement. I know when you ended up on the late report with the motion to dismiss and it really -- it assisted us all and we really do -- we understood and we really appreciated that.

THE COURT: We do try to -- thank you very much. We do try to stay on those reports. They can't do anything to us. I mean, it's one of those things, they're doing it, but it's kind of a pride thing. You know, everybody looks at those to see who's got how many of them on there. You know, you don't say anything, but you know everybody is looking at those reports. So you do try to stay and keep -- and keep going. I mean, there is -- you know, there's a certain pride in getting your work done on time.

But I don't think it's all the justice you can get inside a particular box. That's my only -- the Eastern District of Virginia runs a great court. They've got great judges up there. But a rocket docket, I mean, that fits probably nine out of ten cases, but some cases you just can't fit justice in that box. And so I think that -- I have no problem with -- as long as I've got a really good reason and everybody understands that we're trying to get to an end as quickly as we can, then the court -- the court does that. You're not the only one that I've done that with, but there aren't many. There's got to be a good reason to put it on there.

That was one of the first things I ever found out when I came into my first judge's meeting here in the Western District. At that time Judge Conrad was the chief judge and he ran an idea by me. I said, Well, that's a great idea.

And so we had the meeting, a judge's meeting in chambers, just the Article 3's, and he presented his idea. And it went around the table and all the other judges said, That's a great idea, but we're not doing that in my chambers. That's a great idea, but we're not doing that. It went all the way around. It turns out if all the judges vote to do something one way and one judge doesn't, the one judge will do it their way. There's no way that there's a majority of the judges decides something. Either all the judges buy in or they buy in where they do.

There's a district in Texas where they have plea agreement forms. There are ten separate plea agreement forms. Every judge has their own. And you can't submit a form from -- they tried to get it reduced. None of them will change. So each chambers is kind of its own thing. So that was very, very interesting.

So they really can't do anything to us, but it's important to almost all of us. Not all of us, but -- in the United States, but almost all of us. There are always some that have massive dockets, but -- that are late. What they do is they come down and they ask us, they say, Can you do anything about this? Sure. Okay. Then they come back, Can you please do something about this? It just goes on and on and on. That's one of the problems with our life appointments is they can't do much with us.

But no, I really appreciate that counsel has worked hard on this case. And this is a case where both sides were well armed. You know, a lot of times in cases that I see, one side is better armed than the other. Usually defense counsel is well armed because it's usually a company and they've got plenty of money to hire top notch lawyers. Sometimes plaintiffs are well armed as they were in this case. And sometimes you go, boy, you know, you almost wish you could step down there and take over.

In this case everybody has great lawyers. Everybody has worked hard. This is a good result for, I think, everybody. I'm sure it would never have come about and it saved years of litigation and unnecessary expenses.

MS. HARDEN: Well, we do on behalf of defendants and defendants' counsel echo Tor's comments. We appreciate the court allowing the process to work in a unique way.

THE COURT: Well, I appreciate the professionalism that both sides have shown and the ability to work together in a big case, which sometimes you don't. It's one of those things where sometimes by the time it gets to this point, the lawyers, if they don't hate each other, it seems to the court that they do. So it's good that everyone was able to continue to be friendly in this matter. So I appreciate everyone's cooperation in this.

Anything further?

MR. GRONBORG: Nothing, Your Honor.

MS. HARDEN: No, Your Honor.

THE COURT: All right. We will await West Virginia and then we'll try to get something out. We'll be working on it before that, but that will be sort of the last piece of the puzzle. Once West Virginia decides it does not want to object to this, then we will be ready to rule. And I'll, in the meantime, try to figure out this attorney fee issue fairly to both sides.

MS. HARDEN: Thank you, Your Honor.

MR. GRONBORG: Thank you.

THE COURT: Thank you.

(End of proceedings at 10:17 a.m.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CERTIFICATE OF REPORTER

I, Cheryl A. Nuccio, Federal Official Realtime Court Reporter, in and for the United States District Court for the Western District of North Carolina, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 14th day of August 2015.

s/Cheryl A. Nuccio

Cheryl A. Nuccio, RMR-CRR
Official Court Reporter